[Cite as *State v. Murphy*, 2005-Ohio-135.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-04-012

Appellee — Trial Court No. TRD-0311174A

v.

Sammy D. Murphy — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: January 14, 2005

* * * * *

James W. Conway, Law Director, for appellee.

Brent L. English, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Sammy D. Murphy, appeals the February 20, 2004 judgment of the Norwalk Municipal Court which, following the denial of appellant's motion to suppress, found appellant guilty of driving an overweight tractor-trailer. For the reasons that follow, we reverse the trial court's decision.

{¶ 2} On October 28, 2003, at approximately 9:50 p.m., appellant was driving a commercial tractor-trailer westbound on U.S. 250 in Huron County, Ohio. An Ohio State

Highway Patrol trooper stopped appellant for speeding. Appellant was ultimately charged, under R.C. 5577.04, with violating the load limit for his tractor-trailer.

{¶ 3} Appellant filed a motion to suppress on the grounds that the arresting officer lacked reasonable articulable suspicion to believe that appellant was committing a violation prior to stopping him. At the suppression hearing held on January 23, 2004, Ohio State Highway Patrol Trooper Kevin S. Valentine[1] and appellant testified.

{¶ 4} Trooper Valentine testified that he checked appellant's speed by radar and that the digital read-out showed that appellant was traveling 55 m.p.h. in a 45 m.p.h. zone. Valentine positioned himself behind appellant and activated his overhead lights. Appellant pulled over and, as requested, provided Valentine with his driver's license, vehicle registration, and proof of insurance. Valentine testified that he then asked appellant if he was loaded and that appellant told him he was carrying steel coils. Appellant produced a permit which showed he was permitted to carry two steel coils. Valentine stated that he asked appellant for a bill of lading and that appellant was only able to provide a partial bill. Valentine testified that because appellant did not provide a complete bill of lading he questioned the validity of the permit. Valentine checked the load and found four steel coils.

{¶ 5} Trooper Valentine then called his dispatcher and requested that the district scales team come to his location to weigh the truck. After approximately one hour, the

[1]The parties refer to the officer as Trooper Valentine and Veletean. For purposes of this appeal, we will refer to the officer as Trooper Valentine, as it is worded in the suppression hearing transcript.

inspector arrived; they proceeded to an appropriate location and the truck was weighed. Appellant was then issued a citation for gross weight overload.

{¶ 6} During cross-examination, Valentine testified that appellant's two trailers were covered and that he could not see inside them. Valentine stated that he asked appellant for his "papers" which included "whatever papers that would be." Trooper Valentine testified that appellant provided him with a permit that applied to the truck and to the particular roadway. According to Valentine, appellant told him he was carrying two steel coils.

{¶ 7} Valentine was asked why he decided to look at appellant's load; Valentine responded: "His actions while looking for information I was asking for." Valentine explained that appellant kept stating that he could not find the papers; he would look for a period of time, change the subject, and then look in a different area. Valentine acknowledged that this was the total basis for his belief that appellant's truck might be overloaded.

{¶ 8} During re-direct examination, Valentine stated that appellant was shuffling through all his papers and looking in different compartments of the truck. According to Valentine, appellant began avoiding eye contact and his answers seemed more short. Valentine stated that appellant provided at least a partial bill of lading, though he could not remember if appellant stated that it was incomplete. Appellant continued to look for unspecified papers.

{¶ 9} During Trooper Valentine's re-cross examination, he acknowledged that appellant was very cooperative and polite during the entire stop. Valentine stated that

during the five minutes that appellant was looking for papers, he did not know what papers appellant was looking for and could not recall what papers he requested. Valentine admitted that he did not know if appellant had additional papers unrelated to a bill of lading that applied to his load.

{¶ 10} Appellant testified that he had been traveling with a group of trucks and a car for approximately 15 miles and that they were all going the same speed. Appellant stated that he pulled over to use a convenience store restroom and that Trooper Valentine was next to his truck when he returned. Appellant testified that he gave Valentine his license and permit but had difficulty finding the registration because the truck was new.

{¶ 11} During cross-examination, over defense counsel's objection, the state questioned appellant regarding his state of mind when he presented Trooper Valentine with a permit to carry two steel coils when, in fact, he had four. Appellant was asked if he felt nervous and if he knew what he had done was wrong. Denying appellant's objections, the court indicated that appellant's responses could corroborate Trooper Valentine's testimony that he observed dishonesty. Appellant stated that he simply gave Valentine the paperwork he had and that it did not bother him to present false information to the officer. Appellant testified that he was not aware that the gross weight listed on the bill of lading was incorrect. Appellant stated that he did not know that the four steel coils were overweight. Regarding the initial stop, appellant stated that he did not observe Valentine behind him when he pulled over to use the restroom. He stated that he knew there was a "bear" behind him and would not speed in that instance.

{¶ 12} Following the hearing, on February 18, 2004, the trial court denied appellant's motion finding that:

{¶ 13} "The testimony indicated that the officer had reasonable articulable suspicion to stop the defendant based on the officer properly stopping the defendant for operating a motor vehicle over the speed limit, to wit: 55 mph in a 45 mph zone. Upon stopping the defendant, who was operating a commercial vehicle, the officer asked the defendant if he had a permit, the officer indicated that the defendant showed obvious signs of nervousness and evasive tendencies. The defendant eventually did provide the officer with a permit and the defendant was permitted to carry two steel coils. The officer's visual observation was that the defendant was pulling two trailers, each carrying two steel coils, for a total of four coils."

{¶ 14} Appellant filed a timely notice of appeal and presents the following assignments of error:

{¶ 15} "1. The trial court committed reversible error by denying appellant's motion to suppress where the arresting officer did not have reasonable articulable suspicion to effect a traffic stop.

{¶ 16} "2. The trial court committed reversible error by denying appellant's motion to suppress where the arresting officer, even if he had lawful grounds to effect a traffic stop, did not have reasonable articulable suspicion to believe that appellant's vehicle was overweight.

{¶ 17} "3. The trial court committed reversible error by conducting an investigatory stop and detention without reasonable articulable suspicion to believe that appellant and/or his vehicle were subject to seizure."

{¶ 18} Appellant's assignments of error relate to the trial court's denial of his motion to suppress. When considering a motion to suppress, a trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. An appellate court must independently determine, without deference to the trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 19} Appellant's first assignment of error contends that the trial court's finding that Trooper Valentine had reasonable articulable suspicion to stop appellant for speeding was not supported by competent, credible evidence. In order to make an investigatory stop of a vehicle, a law enforcement officer need only have reasonable articulable suspicion that an offense has been committed, not probable cause. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph two of the syllabus. "Reasonable suspicion means the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion [or stop].' *Bobo* at 178, citing *Terry v. Ohio* (1968), 392 U.S. 1, 20-21." *State v. Hodge* (2002), 147 Ohio App.3d 550, 554, 2002-Ohio-3053, ¶11.

{¶ 20} Upon review of the testimony presented at the suppression hearing, we find that competent and credible evidence supports the court's finding that Trooper Valentine had reasonable suspicion to stop appellant for speeding. Valentine testified that based on his visual observation and radar confirmation, appellant was traveling 55 m.p.h. in a 45 m.p.h. zone. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 21} In appellant's second assignment of error, appellant challenges the trial court's finding that Valentine had reasonable articulable suspicion to believe that appellant's truck was overweight. Under R.C. 4513.33 "[a]ny police officer having reason to believe that the weight of a vehicle and its load is unlawful may require the driver of said vehicle to stop and submit to a weighing of it ***." In *State v. Reiger* (1978), 63 Ohio App.2d 135, this court interpreted R.C. 4513.33 to mean that the officer must have reason to believe that the truck is overweight before he weighs it, so long as the initial stop is lawful. This court has also determined:

{¶ 22} "The 'reason to believe' standard has been interpreted to be the same as the 'reasonable suspicion' standard as set forth in *Terry v. Ohio* (1968), 392 U.S.1, and its progeny. *State v. Myers* (1990), 63 Ohio App.3d 765, 770, 580 N.E.2d 61, citing *State v. Wells* (1983), 11 Ohio App.3d 217, 221, 464 N.E.2d 596. Therefore, for a police officer to stop a vehicle and check its weight, the officer must be able to point to some reasonable and articulable facts that, when taken together with the rational inferences from those facts, lead the officer to believe that 'the weight of the vehicle and its load is unlawful.' *Myers*, supra. 'Specific and articulable facts' are required because without a 'reason to believe' that a vehicle is overweight, a police officer may not stop and weigh a

vehicle. *State v. Ehling* (1973), 36 Ohio App.2d 155, 303 N.E.2d 914. However, an investigatory stop 'must be viewed in the light of the totality of the surrounding circumstances' presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, paragraph one of the syllabus." *State v. Kelley* (Aug. 20, 1993), 6th Dist. No. L-93-024.

{¶ 23} Upon review, many of the overweight truck cases involve an officer's visual observation of bulging tires, a low trailer, the truck pulling hard, bent truck springs, or the truck's strained acceleration. The parties cite to this court's case captioned *State v. Back* (May 22, 1998), 6th Dist. No. S-97-051. In *Back*, we held that a defendant's refusal to provide a bill of lading following a lawful traffic stop was sufficient to form a reasonable suspicion that the truck was overweight. We agree with appellant that *Back* is distinguishable from the facts of this case.

{¶ 24} In the present case, Trooper Valentine testified on direct examination that he asked appellant for a bill of lading. However, during cross-examination he stated that he asked appellant for "papers," "whatever papers that would be." Valentine could not recall what papers he asked for and whether appellant indicated that the bill of lading was incomplete. Valentine also stated that appellant never indicated that he had not found all the paperwork appellant requested. Valentine testified that the reason he suspected that the truck was overweight was that appellant was nervous, began avoiding eye contact while he was looking for the papers, and changed the subject. Valentine then looked into the covered trailers to ascertain that appellant was carrying four instead of two coils as listed on the permit.

{¶ 25} Looking at the totality of the circumstances, we find that the court's determination that Trooper Valentine had reasonable articulable suspicion to believe that the truck was overweight is not supported by competent, credible evidence. It would not be unusual for appellant to lose eye contact with Valentine while in his truck looking for paperwork. Valentine did not suggest that appellant was acting overly nervous or evasive; in fact, Valentine stated that appellant was very polite and cooperative. After providing Valentine with the requested paperwork, appellant should have been permitted to leave. Based on the foregoing, we find that appellant's second assignment of error is well-taken.

{¶ 26} In appellant's third assignment of error, appellant, alternatively, argues that assuming that Valentine approached appellant after he was stopped at the convenience store rather than making a traffic stop, the state's case is no better. Based on our disposition of appellant's first and second assignments of error, we find appellant's third assignment of error moot and not well-taken.

{¶ 27} On consideration whereof, we find that appellant was prejudiced from having a fair trial and the judgment of the Norwalk Municipal Court is reversed. The case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is required to pay the court costs of this proceeding.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. _____

JUDGE

Mark L. Pietrykowski, J.
CONCUR. _____

JUDGE

Richard W. Knepper, J. _____
CONCUR IN JUDGMENT ONLY. JUDGE